

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BERIHU H. FKADU,)	
)	
Plaintiff(s),)	No. C 09-4275 CRB (PR)
)	
vs.)	ORDER OF DISMISSAL
)	
JESS RAPHAEL,)	(Doc # 2)
)	
Defendant(s).)	
_____)	

Plaintiff, a prisoner at Napa State Hospital, has filed a pro se complaint for damages under 42 U.S.C. § 1983 alleging attorney malpractice on the part of his court-appointed public defender, Jess Raphael. Plaintiff also seeks appointment of counsel in this action.

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable

claims or dismiss the complaint, or any portion of the complaint, if the complaint "is frivolous, malicious, or fails to state a claim upon which relief may be granted," or "seeks monetary relief from a defendant who is immune from such relief." Id. § 1915A(b). Pro se pleadings must be liberally construed. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

B. Legal Claims

Plaintiff's complaint must be dismissed because it is well-established that public defenders do not act under color of state law, an essential element of a § 1983 action, when performing a lawyer's traditional functions, such as entering pleas, making motions, objecting at trial, cross-examining witnesses, and making opening and closing arguments. See Polk County v. Dodson, 454 U.S. 312, 318-19 (1981); see also Simmons v. Sacramento County Superior Court, 318 F.3d 1156, 1161 (9th Cir. 2003) (attorneys in private practice are not state actors).

CONCLUSION

For the foregoing reasons, the complaint is DISMISSED for failure to state claim under the authority of 28 U.S.C. § 1915A(b).

The clerk shall enter judgment in accordance with this order, terminate all pending motions as moot (see doc # 2), and close the file.

SO ORDERED.

DATED: Oct. 9, 2009


 CHARLES R. BREYER
 United States District Judge